

A Brief Primer on Case Law Addressing Parentage Issues for Nonbiological Parents Before 2005

While adoption continues to be the usual path to “nonbiological” parentage, it is not the only one. California courts have identified a narrow class of persons who may earn full legal parenthood through application of sections 7611 and 7612 of the California Family Code.¹ Those statutes establish a mechanism for determining legal paternity and also may be applied to determine maternity, as will be discussed later in this article.

How broad the category of “statutorily presumed nonbiological parents” may be is the subject of a fast-developing body of case law. The crucial factors for a court’s evaluation of a person seeking presumed-parent status under the statutory mechanism appear to be whether a biological parent has been identified, the child’s age, and the strength of the bond between the child and the adult seeking a parentage determination.

Section 7611 establishes two presumptions that cannot be rebutted by other evidence once a statutory deadline for the introduction of blood-test evidence has passed:² if a man and the child’s mother have executed a voluntary declaration of paternity under sections 7570 through 7577 or if the man has established the “conclusive presumption” under section 7540 by having been married to and cohabiting with the child’s mother at the time of conception.³ It also sets forth a series of “rebuttable” presumptions. The first three of these are based on the couple’s having married, or attempted to marry, prior to, or after, the child’s birth.⁴ The section that has been the route to “nonbiological” parentage in most cases is 7611(d), under which a man is “presumed to be the natural father” of a child if he has “received the child into his home and openly held the child out as his natural child.”⁵

The leading case thus far on nonbiological parentage is *In re Nicholas H.*⁶ In that case, Thomas, the only man claiming paternity, admitted during dependency proceedings that he was not the child’s biological father.⁷ He had, however, “received and held out” during Nicholas’s four years of life: he had been Nicholas’s primary source of financial support, Thomas and the mother had told all but a handful of people that he was the biological father, and Nicholas considered Thomas his father.⁸ County counsel conceded this much but argued that the presumption was rebutted under section 7612(a),

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Recent case law has interpreted the California Family Code as providing a mechanism for adults who are not biologically related to children to be declared “presumed parents” with full legal rights and responsibilities. How broad the class of such persons may be is the subject of continuing litigation. However, the factors that courts have found most significant to a determination of presumed parenthood are whether a biological parent has come forward, the child’s age, and the extent of the bond between the child and the nonrelated adult. This article briefly addresses the primary cases that have interpreted California’s laws concerning presumed parents. ■

which provides for rebuttal by clear and convincing evidence “in an appropriate action.”⁹ The juvenile court granted Thomas both presumed-father status and physical custody while continuing the dependency.¹⁰ The Court of Appeal reversed, holding that because there was clear and convincing evidence that Thomas was not Nicholas’s *biological* father, the presumption was rebutted.¹¹ A unanimous California Supreme Court, however, reversed the Court of Appeal, noting that it had disregarded the phrase “in an appropriate case.”¹² Because no other man claimed paternity, and because Nicholas would be left fatherless if the presumption were rebutted, California’s high court held that this was not “an appropriate action” for rebuttal.¹³ In doing so, it noted three other Court of Appeal decisions that had recognized nonbiological paternity under sections 7611 and 7612.¹⁴ In one, *In re Raphael P.*,¹⁵ as in *Nicholas H.*, the court held that a nonbiological father could be found a presumed father where no other person had come forward to claim paternity.¹⁶ And in the other two cases, *Stephen W. v. Matthew S.*¹⁷ and *In re Kiana A.*,¹⁸ the courts held that where two men claimed paternity, the one with whom the child had the stronger bond would prevail, even if the other claimant was the biological father.¹⁹

The court in *Nicholas H.* reserved the issue of whether a nonbiological father’s claim could prevail over that of an acknowledged biological father.²⁰ But it resolved that question in favor of a nonbiological father in *In re Jesusa V.*²¹ In that case, though the mother was married to Paul, with whom their five oldest children lived, she resided with Jesusa’s biological father, Heriberto.²² But she spent much of Jesusa’s life under Paul’s protection because Heriberto was physically abusive to her.²³ Dependency proceedings commenced after Heriberto raped the mother.²⁴ Because Paul was married to the mother when Jesusa was born, he qualified as a presumed father under section 7611(a);²⁵ Heriberto claimed paternity under section 7611(d) because he had received the child into his home.²⁶ The juvenile court found that both men qualified as presumed fathers.²⁷ After proceeding under section 7612(b),

which states that, where two or more conflicting claims of paternity are found, the trial court must follow “considerations of policy and logic” in determining which man’s claim prevails, the court determined that Paul was the child’s presumed father.²⁸ The Court of Appeal affirmed, and Heriberto petitioned for review.²⁹ Noting that his criminal and immigration status were likely to preclude Heriberto from acting as Jesusa’s father in the foreseeable future and that Paul qualified as a presumed father under the statute, the Supreme Court majority held that the juvenile court had not abused its discretion by declaring Paul the legal father.³⁰ Two strongly worded dissents focused on Heriberto’s due process rights as a biological father and on Jesusa’s very young age, which distinguished her from most of the children involved in “nonbiological paternity” cases.³¹

As noted, men are not the only “nonbiological parents” found under sections 7611 and 7612. To the surprise of many observers, at least three Courts of Appeal have applied the reasoning of *Nicholas H.* to cases involving women. In the first, *In re Karen C.*,³² the putative mother held Karen out as her biological child to age 10 but then told a social worker that the real biological mother had given Karen to her at birth.³³ Based on the putative mother’s denial of biological maternity, the juvenile court denied the child’s motion to establish the maternity of the woman whom she had always believed was her mother.³⁴ The Court of Appeal reversed, noting that section 7650 dictated that the presumptions under sections 7611 and 7612 should be applied to determinations of maternity where that was practicable and that *Nicholas H.* therefore applied.³⁵ It remanded the case to the trial court for a hearing on whether the facts supported the child’s motion.³⁶

That reasoning was followed in *In re Salvador M.*³⁷ and in *Kristine Renee H. v. Lisa Ann R.*³⁸ *Salvador M.* involved only one claimant to maternity, an adult sister who had raised her younger brother as her own child after their mother’s death.³⁹ The court found that the sister qualified as a “presumed mother.”⁴⁰ *Kristine Renee H.*, along with two other cases, presented the issue of competing maternity claims before the

California Supreme Court. The others are *K.M. v. E.G.*⁴¹ and *Elisa Maria B. v. El Dorado County Superior Court*.⁴² In each of these cases, lesbian partners agreed to produce children through in vitro fertilization, with one of the women being the birth mother. Following birth, the women stayed together for significant periods, with the non-birth mother assuming a parental role. The partners dissolved their relationships and sought the court's assistance on issues concerning visitation, custody, and child support (which are more fully addressed in other articles in this Issues Forum). We now know the outcome of those cases recently argued before the California Supreme Court, analyzed in other articles in this section, and it is more clear than ever that we have come a long way in a short time since the early cases on "nonbiological paternity."

NOTES

1. All statutory references are to the California Family Code.
2. An alleged father has the right to have genetic testing performed to determine if he is the biological father of a child. He can use such testing results to set aside or vacate a judgment of paternity within two years of the date he received notice of an action to establish paternity. But after the two-year time period has expired, he no longer has that right, even if testing does show him to be the biological father. CAL. FAM. CODE § 7635.5 (West 2005).
3. CAL. FAM. CODE §§ 7540, 7570–7577, 7611.
4. CAL. FAM. CODE § 7611(a), (b), (c).
5. CAL. FAM. CODE § 7611(d).
6. *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002).
7. *Id.* at 935.
8. *Id.*
9. *Id.* at 936; CAL. FAM. CODE § 7612(a) (West 2005).
10. *Nicholas H.*, 46 P.3d at 936.
11. *Id.*
12. *Id.*
13. *Id.* at 933–34.
14. *Id.* at 937–40. The court also noted a fourth case, *In re Jerry P.*, 116 Cal. Rptr. 2d 123 (2002), where a man held himself out as the child's father both before and after the birth but was prevented from receiving the child into his home as required by section 7611 of the California Family Code because the child's mother stopped him from doing so. The Court of Appeal in that case held that a nonbiological father may have a sufficient liberty interest in his relationship with the child to attain standing to challenge the statutory scheme that precludes a man from attaining presumed-father status when he has been prevented from receiving the child into his home through no fault of his own. *Nicholas H.*, 46 P.3d at 939; *see also Jerry P.*, 116 Cal. Rptr. 2d at 140–41.
15. *In re Raphael P. III*, 118 Cal. Rptr. 2d 610 (Cal. Ct. App. 2002).
16. *Nicholas H.*, 46 P.3d at 941.
17. *Stephen W. v. Matthew S.*, 39 Cal. Rptr. 2d 535 (Cal. Ct. App. 1995).
18. *In re Kiana A.*, 113 Cal. Rptr. 2d 669 (Cal. Ct. App. 2001).
19. *Stephen W.*, 39 Cal. Rptr. 2d at 539; *Kiana A.*, 113 Cal. Rptr. 2d at 679–80.
20. *Nicholas H.*, 46 P.3d at 941.
21. *In re Jesusa V.*, 85 P.3d 2 (Cal. 2004).
22. *Id.* at 7.
23. *Id.*
24. *Id.* at 6.
25. *Id.*
26. *Id.* at 7.
27. *Id.*
28. *Id.* at 7–8.
29. *Id.* at 8.
30. *Id.* at 13–14.
31. *Id.* at 27 (Kennard, J., dissenting), 32 (Chin, J., dissenting).
32. *In re Karen C.*, 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).
33. *Id.* at 678.
34. *Id.*
35. *Id.* at 681.

NOTES 36. *Id.*

37. *In re Salvador M.*, 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003).

38. *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004).

39. *Salvatore M.*, 4 Cal. Rptr. 3d at 706.

40. *Id.* at 709.

41. *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 2004).

42. *Elisa Maria B. v. Superior Court*, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004).